BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

IDALIA HERNANDEZ Claimant	)	
VS.	)	Docket No. 258,902
TYSON FRESH MEATS, INC. Self-Insured Respondent	)	

ORDER

Respondent requested review of the April 13, 2005 Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on September 7, 2005.

APPEARANCES

Diane F. Barger, of Wichita, Kansas, appeared for the claimant. Gregory D. Worth, of Roeland Park, Kansas, appeared for the self-insured respondent. Also participating in the oral argument at the Board's request, was Michael G. Patton, claimant's former attorney who had filed a Motion to Intervene in the appellate proceedings in order to protect the lien for his legal services filed in this matter.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, the parties agreed that since the issuance of the Award, respondent has paid an additional period of temporary total disability benefits. Thus, any Award must take into consideration claimant's receipt of a total of 6.14 weeks of temporary total disability benefits for a total sum of $1,789.89.

ISSUES

The ALJ awarded claimant a 16 percent functional whole body impairment and a 61.75 percent work disability beginning July 25, 2003, when claimant's employment with respondent was ended because they could no longer accommodate her restrictions. The ALJ also addressed claimant's former attorney's lien by ordering claimant's current attorney to deduct $2,658.75 from her compensation for services and forward it on to claimant's former attorney to compensate him for his services.

The respondent requests review of the nature and extent of claimant's disability. Respondent urges the Board to reconsider the evidence and modify the ALJ's Award to

reflect a 42.25 percent permanent partial disability based upon a 41 percent task loss and 43.5 percent wage loss. This modification would reflect respondent's contention that claimant has obtained post-injury full-time rather than part-time employment, and that Dick Santner's vocational analysis is nothing more than a job list and should be wholly disregarded.

Claimant also asks that the Board modify the ALJ's Award, increasing claimant's task loss to 100 percent and her wage loss to 50 percent. In addition, claimant requests the Board quash the physical therapy records, testimony and written reports of two of respondent's expert witnesses. Claimant contends that Steven Benjamin who prepared a task analysis for respondent was unduly influenced by respondent. Claimant also requests that the written opinions and testimony of Dr. Gary L. Baker be quashed as claimant's counsel failed to disclose either Mr. Benjamin's task list or the physician's on task loss opinion in advance of the deposition. And claimant asserts respondent failed to satisfy or establish the necessary foundation for admission of the physical therapy records which Dr. Baker utilized in forming his opinions.

With respect to Mr. Patton's lien, claimant's present counsel adamantly objects to any consideration of this issue as she asserts Mr. Patton has no standing in this matter.

The issues to be addressed in this appeal are as follows:

1. Mr. Patton's Lien;
2. Nature and extent of claimant's impairment; and
3. Motion to quash the admission of medical reports, records and the testimony and opinions of Dr. Baker and Steven Benjamin.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Former Attorney's Lien

Michael Patton formerly represented the claimant and when his services were terminated in favor of representation by claimant's present counsel, Mr. Patton filed a lien which not only itemizes his time, but also $269.30 in expenses. That lien was the focus of a motion hearing on November 7, 2003 and during that hearing the ALJ specifically indicated that "Ms. Barger is to provide an amount of 12 and a half percent for future check - - for the future checks representing the functional impairment to Mr. Patton, and that if any additional sums are awarded by the [c]ourt and are finalized by whatever appeals process that the parties may go through, we'll have another attorney's fees hearing to

ultimately decide the - - what additional sums should be awarded to Mr. Patton."[1] The amount then awarded to Mr. Patton reflects one-half of 25 percent of the money advanced by respondent to claimant. Obviously the ALJ contemplated a subsequent hearing on this issue and at that point he would consider whether any further fees would be awarded.

The Regular Hearing was held on May 21, 2004 and all parties agree that Mr. Patton was not given any notice of that hearing. Although the issue of his lien was briefly mentioned during the Regular Hearing, the ALJ merely indicated he would address the issue in his Award.

The Award directed claimant's present counsel to deduct $2,658.75 from the net amount of fees generated by claimant's Award and tender that sum to Mr. Patton as and for his representation of claimant. Mr. Patton later learned of the contents of the Award and the subsequent appeal. This finding led to his Motion to Intervene with the intention of enforcing his lien.

After considering this issue, the Board finds the ALJ failed to comply with the statutory requirements of K.S.A. 44-536. That statute contemplates a hearing and notice to each interested party, something that obviously did not occur in this case. Even the ALJ noted at the Motion Hearing that a subsequent proceeding would have to be held to determine the extent of Mr. Patton's lien. For whatever reason, that was not done. Claimant's argument that Mr. Patton has no standing ignores the effect of his lien. Mr. Patton quite clearly has an interest in this matter. The cessation of his representation does not extinguish his interest in this matter. He has a statutory lien and that lien must be addressed and resolved in the manner contemplated by the statute. Accordingly, the Board finds that the sole issue of Mr. Patton's lien must be remanded to the ALJ for further consideration and compliance with the statutory requisites set forth in K.S.A. 44-536.

Contrary to the ALJ's statement, the Board also notes that Mr. Patton's expenses are indeed itemized within his time records which were attached as an exhibit to the Motion Hearing.

Nature and Extent

There is no dispute surrounding the compensability of claimant's January 6, 2000 accidental injury. While performing the mock tender job claimant alleges she injured her finger, wrist, elbow and both shoulders. Respondent provided treatment through a series of physicians. After a court ordered independent medical examination which resulted in the issuance of restrictions, claimant lost her job with respondent beginning July 25, 2003.

In addition to restrictions, Dr. Lynn D. Ketchum assigned a 16 percent functional impairment to claimant's whole body for what he diagnosed as bilateral capsulodesis to the

[1] Motion Hearing Trans. at 4-5.

shoulders, left epicondylitis, trigger finger and traction neuritis of claimant's left ulnar nerve. When asked to comment on the claimant's task loss, he reviewed a task analysis provided by Dick Santner and opined that claimant had a 100 percent task loss.

In contrast, respondent offered the opinions of Dr. Baker, who treated claimant from February 25, 2002 until early 2003. Dr. Baker treated primarily claimant's left elbow performing surgery on April 16, 2002. Following her surgery, he released her from active treatment although he did note her complaints of "locking" finger, which he believed was inflammatory tenosynovitis and "rather diffuse" tenderness complaints in the bilateral shoulders.

When questioned about his rating and claimant's other complaints, he testified that he believed claimant had no permanent impairment in her left elbow. And even though he assigned restrictions due to her work-related complaints, he believed her finger and shoulder complaints would abate over time when, as here, the offending activity is avoided.[2] Thus, his overall rating was 0 percent. He did, however, based upon the vocational analysis performed by Steven Benjamin, assign a 41 percent task loss.

Since leaving her position with respondent, claimant sought employment both on her own and with the assistance of a job placement specialist provided by respondent. After a period of time, claimant finally located employment at McDonald's commencing August 12, 2004 earning $6.90 per hour working 30 to 37 or 38 hours per week on average. Claimant testified that while her regular shift is 7-1/2 hours long, she has no regular schedule and is frequently sent home early if business is slow. She receives no fringe benefits in this job. These facts are borne out by the pay stubs entered into evidence.

The ALJ adopted the 16 percent functional impairment opinion assessed by Dr. Ketchum. The ALJ explained that "[a]lthough Dr. Baker did not believe claimant suffered permanent injury, or at least a ratable functional impairment under the AMA Guides, he imposed lifting restrictions of 20 pounds and frequent lifting of 10-15 pounds. Dr. Baker also testified claimant suffered a task loss. Considering the extent of the injuries and that claimant had surgery with both Drs. MacMillan and Baker, the court finds Dr. Ketchum's rating to be more reasonable."[3] He went on to average the task loss opinions offered by Drs. Ketchum (100 percent) and Dr. Baker (41 percent) and found a task loss of 70.50 percent. He concluded also that claimant had made a good faith effort to find appropriate employment following her termination and sustained a 53 percent wage loss, based upon a post-injury wage of $232.88 per week. This figure was, according to the Award, based upon an average of 33.75 hours per week at the rate of $6.90 per hour.

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[2] Baker Depo. at 16.

[3] ALJ Award (Apr. 13, 2005) at 3.

The Board has considered the functional impairment opinions offered by Drs. Baker and Ketchum and, like the ALJ, is more persuaded by the opinion expressed by Dr. Ketchum. Thus, the ALJ's finding that claimant sustained a 16 percent permanent partial impairment to the whole body is affirmed as are his permanent restrictions.

When, as here, an injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 1999 Supp. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

That statute must be read in light of *Foulk*[4] and *Copeland*.[5] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a) (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

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[4] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[5] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[6]

In this instance both parties take issue with the ALJ's task and wage loss conclusions. Not surprisingly, both parties contend their vocational specialists' opinions are the more credible and should be adopted by the Board. Claimant contends respondent's expert, Steven Benjamin, is essentially a puppet of this respondent. And claimant further contends that respondent's counsel's failure to disclose Mr. Benjamin's report in advance of Dr. Baker's deposition renders that report inadmissible and compromises Dr. Baker's ultimate opinions.

On the other hand, respondent contends that claimant's expert, Dick Santner, has not provided a meaningful job task analysis, but has provided nothing more than a job *listing* which when utilized by Dr. Ketchum yielded an abnormally high, and thus incredible, task loss of 100 percent.

As to the task list, the Board has had occasion to address arguments similar to this in the past. In *Banks*[7] the Board compared two differing methodologies used to develop a task list. The Board commented that task descriptions which are akin to job descriptions (such as was done here by Mr. Santner) do not violate the legislative intent of K.S.A. 44-510e(a). Obviously, the two experts utilized a methodology that would benefit their respective clients and the Board cannot say that one approach is any more appropriate than the other. Thus, the Board affirms the ALJ's decision to average the two and affirms the ultimate task loss of 70.50 percent.

The Board does, however, wish to comment on the respondent's counsel's failure to timely disclose his task loss report in advance of his medical expert's deposition. The record indicates that Steven Benjamin issued his report on April 30, 2004. Then, nearly 4 months later, Dr. Baker was deposed in this claim. Just before the deposition was taken, Mr. Benjamin's report was shared with Dr. Baker for him to render a task loss opinion. Then, when the deposition proceeded, claimant's counsel appeared by phone and the following exchange took place:

> Q. (By Mr. Worth) Let me next hand you what we have marked as Exhibit No. 5 and which I'll represent is a list of work tasks compiled by a vocational expert after interviewing Ms. Hernandez about her prior work activity. First of all, have you seen lists of tasks before in other cases?
> A. Yes.
> Q. Did you have a chance to review this particular list that's been marked Exhibit 5 just before we began your deposition today?

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[6] *Id.* at 320.

[7] *Banks v. Magna Corporation and Topeka Metal Specialties,* Nos. 255,009 and 255,417, 2002 WL 31828570 (WCAB Nov. 19, 2002).

A. Yes, I did.
Q. Did you read the description of each task found within this exhibit and for the purpose of forming an opinion as to whether you believe Ms. Hernandez retains the ability to perform the tasks as described on this exhibit.
A. Yes, I did. And I made corrections or supplied additional information where the entry n/a appears, or no opinion, or whatever that means. What I did was I went through this form and provided an opinion in each and every category and each and every page.
Q. The form was created by that vocational expert including a final column with your name atop of it, did it not?
A. Yes, it did.
Q. Did you understand that perhaps that vocational expert had attempted to predict your opinion on these tasks and Ms. Hernandez' ability to perform them?
A. My assumption was that he reviewed my work restrictions and my notes and he developed an opinion based upon the objective findings that were present in the medical record.
Q. You yourself reviewed each and every one of those tasks so as to perfect your own opinion of Ms. Hernandez' abilities to perform these tasks?
A. Yes, I did.
Q. It there's no notation in your own hand on a given task is that an indication that you would agree with what the vocational expert had predicted for your opinion?
A. Yes, it is.
Q. And in those cases where you may have disagreed or wanted to supplement the form did you write in your own hand your personal opinion?
A. Yes, I did.
Q. We have yeses and noes in these spaces next to each task and under your name your name yet there is a yes that appears either by typewritten or in your own hand. Is that an indication you believe Ms. Hernandez retains the ability to perform that task as described?
A. Yes, it does.
Q. If there was a no either typewritten or in your own hand next to a given task, was that your recommendation that she not attempt to perform that task at this time?
A. Yes. And that statement would agree with the instructions on each and every page where it states the claimant's opinion if could still perform position or no or yes.

MR. WORTH: I'll offer Exhibit 5.

MS. BARGER: I haven't seen it. I don't know what the doctor's opinions are. Did the doctor just fill that out today?

MR. WORTH: The doctor reviewed this before his deposition today.

MS. BARGER: I object to the entry of it because I'm in a position where I can't cross-examine. I have not been provided a copy of this. I don't know what it says. I don't know which vocational person we're talking about because he was never named. This task list has never been identified so I would object to it.

MR. WORTH: For the record, Steve Benjamin is the author of this task list and his deposition will be taken. And you were provided the opportunity to be here today and certainly your choice to participate by phone can not be the basis of an objection to an exhibit I offer today. So your objection is noted for the record. But I am offering Exhibit 5.

> MS. BARGER: I will firmly object because I've never been provided with a copy of Steve Benjamin's task list and I'm not in a position to cross-examine. I can't prepare for examination of this doctor on a document that - -which I have never been provided.
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> MR. WORTH: It's seven pages in length. If you were here you would have the opportunity to do that.
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> MS. BARGER: If I were there I would not have an opportunity to examine it. I would not have had opportunity to review it. The point is it was not provided before this deposition. This is the first time. And I certainly have no opportunity to review the same and to cross-examine this doctor on that because I don't have a copy of Steve Benjamin's work task list. So I would object to that for it not being provided to the claimant in this matter so that he could cross-examine the doctor on this.
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> Q. (By Mr. Worth) Doctor, have all the opinions you have expressed here today been stated within a reasonable degree of medical probability?
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> A. Yes, they have.
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> MR. WORTH: No further questions at this time.[8]

Counsel for the parties bantered back and forth about the lack of advance disclosure of the vocational report and claimant's counsel's concern about her lack of opportunity to prepare. It does not appear that respondent's counsel ever extended the simple courtesy of adjourning the deposition so as to fax a copy of the document, a document which was dated April 30, 2004, to opposing counsel. In fact, he seems to go to great lengths to avoid disclosing the identity of the author of the document being referenced while questioning Dr. Baker. Stranger still, claimant's counsel presses ahead in the deposition and never asked for the document. Although the Board does not find that claimant's counsel's cross examination was compromised, this procedure points out a striking lack of professionalism and courtesy on the part of both attorneys.[9] While there is no formal rule compelling the disclosure of a party's expert vocational reports, it would seem to be a fundamental principle that one could extend opposing counsel the most minimal gesture of fairness and share a vocational report reasonably in advance of the deposition. And in any event, the claimant's perceived bias of respondent's vocational expert only goes to the weight of the evidence, not to its admissibility.

As for the wage loss component of the work disability calculation, respondent does not argue that claimant failed to demonstrate a good faith effort to find an appropriate position following her dismissal from respondent's employ. Rather, respondent contends the ALJ should have calculated claimant's post injury wage based upon a 40 hour work week instead of the average of her actual hours, using 33.75. In support of this argument, respondent cites K.S.A. 44-511(b)(4) (Furse 1993). The pertinent section of the statute provides as follows:

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[8] Baker Depo. at 28-33.

[9] It further points out a glaring omission from the regulations. Rules concerning discovery and the production of documents need to be promulgated by the Director.

> . . . (A) If the employee was a part-time hourly employee, as defined in this section, the average gross weekly wage shall be determined in the same manner as provided in paragraph (5) of this subsection; (B) if the employee is a full-time hourly employee, as defined in this section, the average gross weekly wage shall be determined as follows: (I) A daily money rate shall first be found by multiplying the straight-time hourly rate applicable at the time of the accident, by the customary number of working hours constituting an ordinary day in the character of work involved; (ii) the straight-time weekly rate shall be found by multiplying the daily money rate by the number of days and half days that the employee usually and regularly worked, or was expected to work, but 40 hours shall constitute the minimum hours for computing the wage of a full-time hourly employee, unless the employer's regular and customary workweek is less than 40 hours, in which case, the number of hours in such employer's regular and customary workweek shall govern; (iii) the average weekly overtime of the employee shall be the total amount earned by the employee in excess of the amount of straight-time money earned by the employee during the 26 calendar weeks immediately preceding the date of the accident, or during the actual number of such weeks the employee was employed if less than 26 weeks, divided by the number of such weeks; and (iv) the average gross weekly wage of a full-time hourly employee shall be the total of the straight-time weekly rate, the average weekly overtime and the weekly average of any additional compensation.

Respondent maintains this statute compels the calculation of claimant's post-injury average weekly wage to be based upon a minimum of 40 hours per week.

Respondent's argument is misplaced. The statute upon which respondent relies relates to full-time hourly employees. Claimant testified that she has no regular schedule and that she is often sent home when business is slow. She rarely works more than 38 hours per week and quite often works less than that. The Board finds that the provisions of K.S.A. 44-511(b)(4)(B) do not apply to this situation. Rather, calculation of claimant's wage is based upon the provisions of K.S.A. 44-511(b)(4)(A) which incorporates the provisions of (5) of that same statute. K.S.A. 44-511(b)(5) (Furse 1993) provides as follows:

> . . .the average gross weekly wage shall be the gross amount of money earned during the number of calendar weeks so employed, up to a maximum of 26 calendar weeks immediately preceding the date of the accident, divided by the number of weeks employed, or by 26 as the case may be. . .

Based upon the evidence contained within this record and using the formula set forth above, claimant earned an average of $209.94 per week in the 24 weeks reflected in the earnings record. The Board hereby modifies the ALJ's finding to reflect the figure of $209.94 and when that figure is compared to her pre-injury wage of $490.36, the result is a 43 percent wage loss.

When the 43 percent wage loss is averaged with the 70.50 percent task loss, the result is a 56.75 percent work disability. The ALJ's Award is so modified to reflect this

56.75 percent work disability as of July 25, 2003. Up to that time, she was entitled to a 16 percent functional impairment to the body as a whole.

Motion to Quash

Finally, in her submission letter to the ALJ, claimant filed a Motion to Quash the testimony of Dr. Baker and Steven Benjamin based upon respondent's failure to disclose Mr. Benjamin's vocational report. Claimant also sought an Order excluding from the record certain physical therapy reports upon which Dr. Baker relied alleging respondent failed to lay an appropriate foundation for these records. This motion was never presented at a hearing before the ALJ and was reasserted to the Board in claimant's brief on appeal. Because claimant failed to bring this issue before the ALJ, giving him an opportunity to rule on this issue, the Board will not consider this motion for the first time on appeal.[10]

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated April 13, 2005, is reversed to the issue of attorney fees and otherwise modified as follows:

The claimant is entitled to 6.14 weeks of temporary total disability compensation at the rate of $291.37 per week or $1,789.01 followed by 66.4 weeks of permanent partial disability compensation at the rate of $291.37 per week or $19,346.97 for a 16 percent functional disability followed by 169.11 weeks of permanent partial disability compensation at the rate of $326.92 per week or $55,285.44 for a 56.75 percent work disability, making a total award of $76,421.42.

As of September 30, 2005 there would be due and owing to the claimant 6.14 weeks of temporary total disability compensation at the rate of $291.37 per week in the sum of $1,789.01 plus 66.4 weeks of permanent partial disability compensation at the rate of $291.37 per week in the sum of $19,346.97 plus 114.14 weeks of permanent partial disability compensation at the rate of $326.92 per week in the sum of $37,314.65 for a total due and owing of $58,450.63, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $17,970.79 shall be paid at the rate of $326.92 per week for 54.97 weeks or until further order of the Director.

The issue of the attorney's fee lien is hereby remanded for further proceedings.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

IT IS SO ORDERED.

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[10] K.S.A. 44-555c(a); Signer v. Wichita State University/State of Kansas, No. 1,014,700, 2004 WL 1067488 (WCAB Apr. 30, 2004).

Dated this _____ day of September, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

CONCURRING OPINION

Tasks lists are considered on a case by case basis. Mr. Santner's task list appears to be more of a general job description rather than a breakdown of the individual work tasks that comprise the job. Accordingly, Mr. Santner's list is considered appropriate by only the barest of margins.

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BOARD MEMBER

DISSENT

The undersigned Board Member respectfully dissents from that portion of the majority's Order overruling claimant's objection to Exhibit No. 5 to the deposition of Gary L. Baker, M.D.

Respondent elected to present the expert witness testimony of Dr. Baker by evidentiary deposition. That deposition was taken on August 19, 2004 at the office of respondent's counsel in Roeland Park, Kansas. Claimant's counsel, who's office is in Wichita, Kansas, was not present at the deposition in person, electing instead to appear by telephone.

During the deposition, respondent's counsel asked Dr. Baker to review a job task list prepared by Steven Benjamin, respondent's vocational expert, and to render an opinion as to which, if any, former job tasks claimant could no longer perform due to her work-related injuries and resulting restrictions. Claimant objected.

As quoted the by the majority the definition of permanent partial disability in K.S.A. 44-510e(a) includes:

> . . . **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident,** averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.
> (Emphasis added.)

Obviously, the task loss opinion respondent was seeking from Dr. Baker was an important issue in this case. Nevertheless, Dr. Baker was apparently not asked to give a task loss opinion until the day of his deposition. That opinion is not contained in his April 21, 2003 report.[11] In the absence of a report containing Dr. Baker's task loss opinion, counsel for claimant should have, at a minimum, been provided with a copy of Mr. Benjamin's task list no later than when the notice to take Dr. Baker's deposition was served. K.S.A. 44-554 provides that "depositions of witnesses . . . [are] to be taken in the manner prescribed in civil actions in district courts in this state." Unfair surprise and trial by ambush are not favored in our state district courts.

Claimant's counsel entered a timely objection at the deposition to the use of the task list prepared by Mr. Benjamin "because I've never been provided with a copy of Steve Benjamin's task list and I'm not in a position to cross-examine."[12] Claimant's objection was well taken and should be sustained. As such, respondent's Exhibit No. 5 to the Baker deposition and Dr. Baker's task loss opinions based upon that exhibit, should be excluded from the record.

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BOARD MEMBER

c: Diane F. Barger, Attorney for Claimant
Michael G. Patton, Former Attorney for Claimant
Gregory D. Worth, Attorney for Self-Insured Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[11] Baker Depo., Ex. 4.

[12] *Id.* at 32.